Bivens & Associates P.L.L.C.
ELDER LAW • ESTATE PLANNING • SPECIAL NEEDS

**Stephanie A. Bivens, Esq., C.E.L.A.**
**Charlotte C. Johnson, Esq.**
**Robin Cochran Kruger, Esq.**
**Letty Segovia, Esq.**
**Megan Selvey, Esq.**

5020 E. Shea Blvd.
Suite 100
Scottsdale, AZ 85254

Telephone: 480-922-1010
Fax: 480-907-3323
web: bivenslaw.com

# Estate Planning and Probate

The goal of estate planning is typically straight forward: to receive maximum enjoyment of your assets during your lifetime, provide for management of your assets and medical decision making in the event of your incapacity, and eventually, at death, transfer the assets with minimum taxation, court involvement, and family conflict to the person(s) or entities desired. However, no two estate plans are the same.

The following provides basic information on the most common estate planning documents:

## What is a Financial Power of Attorney?

A financial power of attorney allows you to appoint a person or entity, known as an agent or attorney-in-fact, to manage financial matters on your behalf as specifically set forth in the document. The financial power of attorney may grant the Agent immediate authority to act, or authority only upon subsequent incapacity. If you do not have a financial power of attorney in place and you later cannot manage your affairs due to illness or injury the court may have to intervene and appoint someone to act as Conservator. It is far better to be proactive and execute a financial power of attorney just in case of emergency.

## What is a Health Care Power of Attorney?

A health care power of attorney is a written statement in which you name someone to make health care decisions for you. That person will make health care decisions for you only when you cannot make or communicate such decisions yourself. If you do not have a health care power of attorney in place, the law prescribes who will have authority to act as your medical surrogate decision maker. This person(s) may or may not be the person(s) you would select. It is far better to select your medical decision maker yourself.

## What is a Living Will?

A living will is a written statement about medical treatment you would or would not want that is to be followed if you cannot make your own health care decisions. For example, a living will typically sets forth end of life medical treatment wishes. The living will can help you say “yes” to treatment you want and “no” to treatment you do not want, even when you are not then capable of verbally expressing your wishes. Without a valid living will in effect, there may be dispute among family which can lead to expensive and lengthy litigation and/or medical treatment you may not desire. By executing a living will you can be assured your wishes will be known, honored, and family will have peace of mind in making difficult decisions.

**What is a Mental Health Power of Attorney?**

A mental health care power of attorney authorizes the Agent to consent to mental health or psychiatric treatment on an outpatient or inpatient basis. Persons without history of mental illness can benefit from this power of attorney, specifically including persons with Alzheimer's disease and/or dementia who may from time to time present with psychiatric behaviors. If you ever need in-patient mental health treatment and do not have this document, your family may have to go to Court and pursue a guardianship with mental health treatment authority for you.

**What is a Last Will and Testament?**

A Last Will & Testament provides for distribution of property at death that is not already automatically conveyed upon death, such as assets with designated beneficiaries, assets with right of survivorship, "pay on death" or other similar designations, and trust assets. A Last Will and Testament should nominate a Personal Representative who will be responsible for administering the estate, nominate a Guardian for any minor children, nominate a Trustee for assets to be held in trust for minor children, as well as funds to be held in trust for tax planning purposes or intended devisees with special needs or who are otherwise unable to manage their affairs.

**What is a Revocable Trust?**

There are many different types of trusts; however, a revocable trust is the most commonly used trust to both allow for management of an individual's assets for their benefit during their lifetime, and at their death distribute the remaining trust assets to their stated beneficiaries without a probate court proceeding. A trust is a written agreement between three parties: (1) the "Trustor", whose assets fund the trust, (2) the "Trustee," the individual(s) who has authority to invest, manage, and distribute trust income and/or principal, and (3) the "Beneficiary(ies), for whose benefit the trust is established. In most instances, the Trustor, Trustee, and Beneficiary are initially the same person. Such a trust is created during the Trustor's lifetime and will provide that all trust income and principal shall be used for the Trustor's benefit. A Successor Trustee should be designated so that in the event of the initial Trustee's incapacity or death, the Successor Trustee may easily take over management of the trust. The Trustor may amend or terminate the trust while competent. Upon the Trustor's death, the trust becomes irrevocable. At the Trustor's death, the trust agreement shall designate how and to whom the trust assets shall then be distributed, or whether the assets shall continue to be held in trust for the benefit of other persons. If a married couple has an otherwise taxable estate, the trust agreement can be drafted in such a way so as to avoid/minimize estate taxes.

In short, when properly drafted a revocable trust may provide for continuity in administration of the trust estate upon incapacity or death of the Trustor, avoid probate at death, and minimize estate taxes.

**When is probate required?**

Probate is the term that describes a superior court proceeding in which the court appoints a personal representative of the estate of a deceased person (decedent) who is responsible for identifying and marshaling all the estate assets, paying all valid debts and expenses, and distributing the remaining estate assets as directed in the Will, or if there is no Will, in accordance with the Arizona laws of intestate succession. Before you can determine if a probate is required, someone must prepare an inventory of the assets owned by the decedent at death. The purpose of the inventory is to determine if there are any assets of the deceased that remain titled to the decedent after his or her

death. In Arizona, a probate proceeding is required if, on the date of death, the decedent had personal property valued at more than $75,000.00, (e.g., checking, savings, stocks, bonds, vehicles, etc.), or equity in real property valued at more than $100,000.00 which remains in the decedent's name for the reason the account or asset was not otherwise automatically conveyed to another person(s) at time of death by operation of beneficiary designation, joint tenancy with right of survivorship, pay on death, transfer on death designation, or is titled to a trust.

For smaller estates (less than $100,000 in real property and less than $75,000 in other property), both personal and real property can be transferred directly to the heirs or beneficiaries of a decedent's estate by affidavit, no sooner than thirty (30) days after date of death in the case of personal property or six (6) months after date of death in the case of real property, without the need for probate or the appointment of a Personal Representative.

Even if not mandated by law, in certain cases probate is still desired. Probate can be used to settle all creditor claims, as well as family or other disputes. In addition, probate allows for the sale or conveyance of real property sooner that waiting the prescribed 6 month period to use an affidavit.

**What is the Probate Process?**

Probate can be accomplished informally, that is, be initiated by application and conducted by the court registrar, rather than a judge, and without prior notice to interested person(s), or formally, that is, initiated by petition and conducted by a judge with notice to interested person(s) as defined by statutes. Whether there is informal or formal probate will depend on the specific circumstances of each case.

The Personal Representative nominated in a Will generally is appointed or, if there is no Will, the individual or entity having priority under the law. In general, a probate must be initiated within two (2) years of the decedent's date of death and, at a minimum, must remain open for four (4) months after the date of the first publication to creditors, during which time all unknown creditors must present their claims against the estate to the Personal Representative.